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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CLUB SAFARI, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B209603 (Los Angeles County Super. Ct. No. BS 107249)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Roger Jon Diamond for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Jeri L. Burge, Assistant City Attorney, and Terry P. Kafmann Macias, Deputy City Attorney, for Defendant and Respondent.

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Appellant Club Safari, Inc., a California corporation doing business as Club Safari, petitioned the zoning administrator (ZA) of respondent City of Los Angeles for a conditional use permit (CUP) to operate primarily as a karaoke operation with 10 private karaoke rooms. The ZA denied the petition and respondent's Central Area Planning Commission (Central APC) denied appellant's appeal. Appellant filed a petition for a writ of administrative mandamus, which the trial court denied. We affirm.

PROCEDURAL HISTORY[1]

Appellant operates a restaurant located at 731 South Alvarado Street in Los Angeles; the restaurant serves a full line of alcoholic beverages. On or about January 12, 2006, appellant applied for a CUP that would have allowed 10 private banquet or studio rooms featuring karaoke entertainment, all located on the restaurant's premises. As it happened, appellant had already added the karaoke rooms without obtaining a CUP. As a result of this, appellant was cited in the fall of 2005 by the Department of Building and Safety for having converted to a "bar with sit down Karaoke rooms" without a permit.

Appellant's application for a CUP was based on section 12.24 of the Los Angeles Municipal Code.[2] In relevant part, section 12.24E provides that in approving any conditional use, the decisionmaker "must find that the proposed location will be desirable to the public convenience or welfare, is proper in relation to adjacent uses or the development of the community, will not be materially detrimental to the character of development in the immediate neighborhood."

The staff of the Department of City Planning, Office of Zoning Administration investigated appellant's application for a CUP and prepared a report in June 2006. The report summarized appellant's application as a project consisting of "expanding the existing use of a restaurant dispensing a full line of alcoholic beverages for on-site consumption with hours of operation from 10 a.m. to 2 a.m. daily to include karaoke" with "10 banquet/studio rooms that will include a karaoke system for entertainment

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1 This section of our opinion also contains a summary of the operative facts.

2 We take judicial notice of this provision.

purposes to be used by the patrons of the restaurant." Among other things, the report noted that appellant's restaurant is located in a high crime district and that appellant has a poor record of compliance with conditions imposed by the California Alcoholic Beverage Control Board (ABC).

The report also noted that the commanding officer of the Los Angeles Police Department's Rampart Area Vice, Captain Debra McCarthy, informed the Office of Zoning Administration by a letter of February 22, 2006, that the police department "strongly oppose[d]" granting appellant's application for a CUP. Captain McCarthy's letter noted that a random inspection by the ABC in February 2006 disclosed multiple "flagrant" violations of conditions imposed by the ABC. The ABC prohibited any of appellant's employees from accepting fees for serving as companions of the restaurant's patron. Fourteen female Asians were found on the premises; the manager stated that they were waiting for customers to keep them company in the individual karaoke rooms. The ABC prohibited sale of alcoholic beverages by the bottle, but appellant listed 10 different distilled spirits at $500 per bottle. Live entertainment was to be limited to one musician and karaoke was prohibited. Yet, four karaoke machines were found on the premises. Although sequestered rooms were prohibited, the inspection disclosed nine individual rooms that were completely enclosed. There were other violations that are not necessary to detail. Captain McCarthy's letter closed by stating that issuance of the CUP would be detrimental to public safety and that the police department was seriously concerned that issuance of the CUP "would attract an additional criminal element to the area."

The city's ZA held a public hearing on July 10, 2006. Among other evidence, the ZA considered the site of the restaurant, Captain McCarthy's letter and various administrative actions involving appellant, including the citation in 2005 for operating unpermitted karaoke rooms. The ZA also noted that there had been a federal indictment that identified appellant's location as a brothel employing Koreans without legal resident

status as prostitutes.[3] A representative of the Los Angeles City Attorney's office also appeared at the hearing and seems to have voiced objections to the application. The record does not disclose precisely what those objections were.

The ZA came to a number of conclusions that are not notable for their precision or clarity. Reduced to its essential aspects, the ZA's conclusions are that a denial of the application would not hinder appellant from operating the restaurant; that the restaurant had been the site of illegal activity and that "intensification" of the use of the site would be contrary to the recommendations of the police department and the city attorney's office; that appellant had violated a number of conditions imposed by the ABC; that appellant had adopted the private karaoke room format without a permit; and that "intensification" of the use of the property "poses too great a risk to the public at large and welfare of the pertinent community."

The appeal from the ZA's decision was heard before the Central APC on January 9, 2007. The Central APC first heard from the ZA who summarized his earlier conclusions. Next, appellant's representative, Steve Kim, spoke in support of the application. Kim emphatically denied that prostitution was occurring on appellant's premises and offered to work with the police department to "devise a security plan" to make sure the "public . . . is protected." Kim was followed by the senior lead police officer from the Los Angeles Police Department Rampart Division, who stated that prostitution was taking place in the karaoke rooms. Next was a representative from the city attorney's office, Bill Larson, who referred to the plea agreement between the United States and Alexander Moon. (See fn. 2, *ante*.) Larsen stated that Moon had been engaged in bringing in women illegally into the United States and then requiring the

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[3] The administrative record contains a copy of a plea agreement filed in the U.S. District Court for the Central District of California in which Alexander Y. Moon, formerly appellant's manager, pleaded guilty to hiring an alien as an employee at appellant's restaurant, who was not admitted to residence in the United States. The plea agreement was filed on October 26, 2006, after the hearing before the ZA and before the appeal from that decision was heard.

women to repay the fee (stated to be $15,000-$25,000) by engaging in prostitution. A representative from the city council member's office also supported the recommendation that the application be denied.

Kim responded to the foregoing by stating that the current owner of appellant's restaurant was conducting a lawful business, that Moon had nothing to do with appellant's current operations and Kim again denied that prostitution was taking place. Kim stressed that karaoke was part of Korean culture, that a million dollars had been invested in the business, which was now 10 years old, and that the current operator/owner had done a fine job of running the business. But Kim admitted that "[s]inging does exist. Drinking does exist. A companion does exist" and that this sounded "real bad" and could be "misconstrued."

Two of the five commissioners of the Central APC spoke at the conclusion of the hearing and pointed to the reports about prostitution as the reason to deny the appeal, which the commissioners did by a 5-0 vote.

The hearing on appellant's petition for a writ of mandamus was held on June 25, 2008. Initially, the trial court stated that it was "not impressed by indictments," referring to Moon's case, a view with which we agree. We also agree with the trial court's statement that the ZA's decision was confusing "and unsupported in particular areas" and that the court had "trouble trying to figure out what the [ZA] was talking about." This said, and after listening to counsels' arguments, the trial court focused on the facts that appellant had operated the karaoke rooms without a permit and that prostitution was taking place on the premises. The trial court also referred to the police department's opposition to the application, concluding that what the police "have to say is a factor; it is worth listening to." The court denied the petition for a writ of mandate.

DISCUSSION

1. The Nature of a CUP

"The statutes and ordinances provide for two kinds of relief to persons whose nonconforming uses ought to be allowed; variances [citation] and conditional use permits. A conditional use permit is an exception for a particular use that promotes the

public welfare and will not impair the character of the district." (8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 1050, p. 651.)

"A CUP is discretionary by definition." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224.) "Where a zoning ordinance authorizes the planning commission or city council to grant a conditional use permit upon finding the existence of certain facts, their action will not be disturbed by the courts in the absence of a clear and convincing showing of the abuse of the power of discretion vested in them. [Citation.] Whether or not the granting of the permit herein was wise as a matter of policy is something which is beyond the courts to determine unless the ordinance under which such action is taken is unconstitutional or void. The rule is indelibly written into our law that all questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts. In the exercise of the policy power a large discretion is vested in the legislative branch of the government. The function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion. Courts are not authorized to entertain a hearing de novo and then make such order as in their opinion the municipal authorities should have made. Were the rule otherwise, courts would be usurping the functions of the municipal governing body [citation]." (*Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 361.) In this court, the substantial evidence test applies.[4]

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[4] "Findings must be made by the quasi-judicial body as part of its determination of whether to grant or deny a CUP. [Citation.] Such findings must be supported by substantial evidence in light of the entire record. Appellate courts review such adjudicatory planning actions under the substantial evidence standard, looking to the administrative record to determine whether the agency's decision is supported by substantial evidence and whether the findings of the agency support the decision made. [Citation.] Reasonable doubts must be resolved in favor of the decision of the agency. [Citations.]" (*BreakZone Billiards v. City of Torrance*, *supra*, 81 Cal.App.4th at p. 1244.)

2. Standards Governing the Evidence

In evaluating the evidence, we turn to Government Code section 11513. This provision applies to formal hearings conducted under the Administrative Procedure Act (1 Witkin, Cal. Evidence (4th ed. 2000) Introduction, §§ 52, 55, pp. 56-57, 60-61) and not to hearings conducted before local agencies (1 Witkin, *supra*, Introduction, § 53, pp. 58-59), particularly to hearings regarding an application for a CUP, which are said to be "more or less informal." (66A Cal.Jur.3d (2002) Zoning and Other Land Controls, § 312, p. 316.) Nonetheless, if the evidence meets the standards of Government Code section 11513, it is sufficient for the purposes of a CUP hearing conducted by a local agency.

"The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, § 11513, subd. (c).) "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." (Gov. Code, § 11513, subd. (d).)

3. The Evidence Supports the Denial of Appellant's Application for a CUP

We begin with the observations that an applicant for a CUP does not have property right to a CUP (*BreakZone Billiards v. City of Torrance*, *supra*, 81 Cal.App.4th 1205, 1244), that the wisdom of the decision to deny the application is not for us to decide (*Wheeler v. Gregg*, *supra*, 90 Cal.App.2d at p. 361) and that our function is to determine whether substantial evidence supports the decision that was made. (*BreakZone Billiards v. City of Torrance*, *supra*, at p. 1244.)

As the trial court found, it is uncontradicted that appellant simply converted to the private karaoke room format without a permit and then, after having been cited for this violation, sought to legitimize this illegal business operation. Whether, standing alone,

this would warrant a denial of the application is not necessary to decide as there is additional evidence justifying the denial of the application. Nonetheless, it is a serious matter that appellant converted to the private karaoke room format without a permit, especially because appellant knew that this format violated ABC's conditions. In other words, the decision to adopt this format was not the product of ignorance but rather a deliberate violation of conditions laid down by a responsible public agency.

There was evidence that women engaged in prostitution with patrons at appellant's establishment. This was evidence that 14 females on the premises were waiting to act as "companions" and that the police department had concluded that prostitution was taking place on the premises. There was also the admission by appellant's representative, Steve Kim, that a "companion does exist" and that this sounds "real bad." It is true that some of this evidence was hearsay, while other evidence, such as the testimony of the senior lead officer from the Rampart Division, was both hearsay and opinion evidence. Yet, there were no objections to this evidence and it was therefore proper to take this evidence into account. (Gov. Code, § 11513, subd. (d).) And it has been held that opinion evidence, even the opinions offered by counsel, may be considered when determining an application for a CUP. (*Floresta, Inc. v. City Council* (1961) 190 Cal.App.2d 599, 608.) It is clear that some of the activities that took place on appellant's premises were undesirable in terms of public welfare and that under Los Angeles Municipal Code section 12.24M it was therefore appropriate to deny the application.

Finally, we think that Captain McCarthy's letter, which included comments by the ABC, are clearly "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" (Gov. Code, § 11513, subd. (c)) and that both of these documents convincingly validate the decision to deny the application.

4. Appellant's Contentions Are Without Merit

We do not agree with appellant that the decision to deny the application was based on the indictment of Alexander Moon, appellant's former manager, and on the violations of ABC's conditions.

While Moon's indictment was mentioned at one point in the 14-page report prepared by the ZA and the city attorney's representative referred to the indictment in his statement before the Central APC, there was other evidence that prostitution was taking place on appellant's premises. In any event, we agree with the trial court that, standing alone, the indictment proves nothing. As far as the ABC violations are concerned, it is not the ABC violations but the facts underlying those violations that are important. And, as noted, those facts came into evidence without objection.

We do not agree that Los Angeles Municipal Code section 12.24 is vague. This specific provision has been repeatedly held to be a valid "general welfare standard" and claims that section 12.24 are impermissibly vague have also been repeatedly rejected. (*Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 548; *Case v. City of Los Angeles* (1963) 218 Cal.App.2d 36, 42; *Wheeler v. Gregg*, *supra*, 90 Cal.App.2d 348, 362-363.)

While appellant professes not to be able to answer the question how the "proposed use" would "affect the welfare of the pertinent community," we do not find it difficult to conclude that encouraging and fostering certain activities in and about a restaurant is indeed a blight, as well as a danger, to any community.

There is no evidence in this case of a practice on the part of the police department to "prohibit karaoke rooms." In fact, there is no evidence that this is a police "practice."

In its reply brief, appellant contends that Los Angeles Municipal Code section 12.24 does not "say that a permit is necessary when another use is to be added to an existing use." One flaw in this argument is that appellant's application for a CUP specifically relied on section 12.24. Thus, the theory advanced in the reply brief, that section 12.24 does not apply, contradicts the theory previously pursued by appellant. It is basic that an appellant may not change a theory previously relied upon for purposes of review on appeal. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, pp. 466-468.) It is also basic that an appellate court will disregard points that are raised for the first time, as here, in appellant's reply brief. (9 Witkin, *supra*, Appeal, § 723, pp. 790-791.) Appellant's reply brief also states that section 12.24 does not apply because this provision "simply states that the City may deny the application if the 'use does not

conform to the purpose and intent of the findings required for a conditional use.'" The plain text of section 12.24E, which appears at page 2, *ante*, shows that this contention is without merit. Under section 12.24E, a CUP may be denied when, as here, the proposed use does not comport with public welfare.

Finally, appellant claims it is the subject of a "bureaucratic nightmare" in which it cannot have the ABC prohibition against karaoke rooms lifted until it resolves its problems with respondent, but respondent refuses to do so because ABC will not lift the prohibition. One way out of this impasse is for appellant to start complying with the law.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

O'NEILL, J.*

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.